

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 20554**

In the Matter of)	
)	
Electronic Delivery of MVPD Communications)	MB Docket No. 17-317
)	
Modernization of Media Regulation Initiative)	MB Docket No. 17-105
To: The Commission		

**JOINT COMMENTS OF CBS CORPORATION, THE WALT DISNEY COMPANY,
21ST CENTURY FOX, INC., UNIVISION COMMUNICATIONS INC., ABC
TELEVISION AFFILIATES ASSOCIATION, CBS TELEVISION NETWORK
AFFILIATES ASSOCIATION, FBC TELEVISION AFFILIATES ASSOCIATION AND
NBC TELEVISION AFFILIATES**

February 15, 2018

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY.....	1
I. A DEFAULT RULE FOR CABLE CARRIAGE ELECTIONS IN FAVOR OF RETRANSMISSION CONSENT SQUARES WITH MODERN STATION PRACTICE.....	3
II. THE COMMISSION CAN SUBSTANTIALLY REDUCE PAPERWORK BURDENS ON COMMERCIAL BROADCASTERS AND CABLE OPERATORS BY MAKING RETRANSMISSION CONSENT STATUS THE DEFAULT ELECTION.	5
III. BY AMENDING THE DEFAULT RULE FOR CABLE CARRIAGE ELECTIONS FROM MUST CARRY TO RETRANSMISSION CONSENT, THE COMMISSION WOULD ELIMINATE REGULATORY INCONSISTENCY WITH RESPECT TO SATELLITE CARRIERS.	7
IV. THE COMMISSION SHOULD AMEND ITS RULES TO PROVIDE FOR ELECTRONIC NOTICE OF AFFIRMATIVE CARRIAGE ELECTIONS.....	8
CONCLUSION	10

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 20554**

In the Matter of)	
)	
Electronic Delivery of MVPD Communications)	MB Docket No. 17-317
)	
Modernization of Media Regulation Initiative)	MB Docket No. 17-105

To: The Commission

INTRODUCTION AND SUMMARY

CBS Corporation, The Walt Disney Company, 21st Century Fox, Inc., Univision Communications Inc., ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association and NBC Television Affiliates (the “Joint Broadcast Commenters”), submit these comments in response to the Notice of Proposed Rulemaking (“NPRM”) in the above-captioned proceeding.¹

The Joint Broadcast Commenters commend the Commission for continuing its initiative to modernize and/or eliminate media regulations that are outdated, unnecessary, or otherwise fail to serve the public interest.² The Commission’s rules concerning carriage elections—on which the Commission has invited comment in its NPRM—are chief among those warranting a fresh approach.³ In particular, the Commission should revise its rules so that (1) when a commercial broadcast station does not affirmatively provide an election notice to a cable

¹ *Electronic Delivery of MVPD Communications; Modernization of Media Regulation Initiative*, Notice of Proposed Rulemaking, FCC 17-168, MB Docket Nos. 17-317, 17-105 (rel. Dec. 14, 2017) (“NPRM”).

² *See Commission Launches Modernization of Media Regulation Initiative*, Public Notice, 32 FCC Rcd 4406 (2017).

³ *See* NPRM at 13-15 (¶¶ 25-27).

system in its market, the station is deemed to have provided notice of an election of retransmission consent, and (2) any affirmative notice of a carriage election can be provided electronically.

The current rules for cable carriage elections are needlessly onerous—requiring commercial broadcasters to send retransmission consent elections on a system-by-system basis, by certified mail.⁴ In reforming these rules, among other things the Commission should address a subset of the broader question of how notice of triennial carriage elections are made: the election deemed to have been made when no affirmative notice is provided to a cable operator, also known as the default election.

Currently, if a commercial broadcast station does not provide any affirmative notice of a carriage election to a cable system in its market, it is deemed to have notified the cable system that it has defaulted to must-carry status. Given that most commercial broadcasters desire to elect retransmission consent status, setting the default election at “must carry” status is inconsistent with modern station practices, imposes significant paperwork burdens on broadcasters and cable operators alike, and results in disparate regulatory treatment of cable operators and satellite carriers (for whom the default election is retransmission consent).

Accordingly, the Joint Broadcast Commenters respectfully request that the Commission revise its rules such that the default election for commercial stations in the absence of affirmatively delivering notice to a cable system would be for retransmission consent, not an election for must carry. As occurs today with carriage elections for satellite carriers, the absence

⁴ See Comments of CBS Corporation, The Walt Disney Company, 21st Century Fox, Inc., and Univision Communications Inc. at 11, *Modernization of Media Regulation Initiative*, MB Docket No. 17-105 (filed July 5, 2017) (“CBS, Disney, Fox, and Univision Comments”).

of an election notice to the cable system would provide effective notice to the system that the commercial broadcast station has elected retransmission consent status.

For those stations that provide an affirmative notice of a carriage election (*e.g.*, for must-carry), the Commission should modernize its rules to provide for online, electronic notice in a streamlined manner.⁵ Just as the Commission has recognized the benefit of replacing paper filings with online notices in other contexts, the Commission should modernize its cable notice rules to take advantage of the efficiencies of online notification.

With these simple changes in rules—a change of the default election to “retransmission consent” status and modernization of the means of providing affirmative notice of an election—the Commission would dramatically diminish paperwork burdens on commercial broadcasters and cable operators alike.

I. A DEFAULT RULE FOR CABLE CARRIAGE ELECTIONS IN FAVOR OF RETRANSMISSION CONSENT SQUARES WITH MODERN STATION PRACTICE.

Most commercial stations today elect retransmission consent as their carriage option for all multichannel video programming distributors (“MVPDs”) in their market. Yet the default election for one type of MVPDs, cable systems, is out of sync with this practice by presuming an election of must carry for stations that do not deliver a timely, affirmative election notice.

Section 325 of the Communications Act and the Commission’s implementing regulations provide that no commercial broadcast station can be retransmitted by a cable system

⁵ See NPRM at 13 (¶ 25) (soliciting comment on “how to revise Section[] 76.64(h) . . . of [the Commission’s] rules to permit television broadcast stations to use alternative means of notifying [cable operators] about their carriage elections”).

without the station’s express authority.⁶ As the Commission has explained, “[t]his authority may be expressed by a station’s election of mandatory carriage . . . or by its election of retransmission consent.”⁷ When a station does not affirmatively send an election notice to a cable system in its market, the station “defaults to must carry status.”⁸ That is, the failure to make a timely, affirmative notice, in effect, today provides notice to the cable system that the station has granted its authority to be carried on a mandatory basis rather than through a written agreement under retransmission consent.

This default rule finds its origins in the 1992 Cable Act that established the retransmission consent regime. Because broadcasters prior to that Act had grown to rely on the historic availability of must carry, it arguably made sense at the time to find that a failure to send a timely election notice amounted to notice of an election of must-carry status. However, this rule no longer matches modern practice in the marketplace.

In 2010, less than 40 percent of broadcasters elected or defaulted to must-carry status rather than electing retransmission consent.⁹ Moreover, given the increased importance retransmission consent fees have played in stations’ business models since 2010,¹⁰ it is likely that

⁶ See 47 U.S.C. § 325(b); 47 C.F.R. § 76.64(a).

⁷ *Matter of Lenfest Broad., LLC*, Memorandum Opinion and Order, 29 FCC Rcd 524, 525 (¶ 2) (2014); see also *id.* at 525 (¶ 3) (recounting that the commercial station in question “is a default must carry station by virtue of having failed to make an affirmative carriage election by October 1, 2011”).

⁸ *Id.* at 525 (¶ 2).

⁹ *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, Fourth Further Notice of Proposed Rulemaking and Declaratory Order, 27 FCC Rcd 1713, 1718 (¶ 10) (2012).

¹⁰ See Jon Lafayette, *Study: TV Station Revenue to Reach \$32.8 Billion by 2020*, Broadcasting & Cable (Apr. 20, 2017, 4:00 AM), <http://www.broadcastingcable.com/news/currency/study-tv-station-revenue-reach-328-billion-2020/165050>.

even fewer broadcasters elected or defaulted to must carry in the most recent election cycles. As a result, defaulting to retransmission consent in the absence of the provision of an affirmative election notice would be more consistent with contemporary station practices.

II. THE COMMISSION CAN SUBSTANTIALLY REDUCE PAPERWORK BURDENS ON COMMERCIAL BROADCASTERS AND CABLE OPERATORS BY MAKING RETRANSMISSION CONSENT STATUS THE DEFAULT ELECTION.

The Commission's rules require broadcast stations to send carriage election notices via certified mail to each cable system in the station's market on or before the election deadline.¹¹ This requirement imposes significant financial and administrative costs on broadcasters and cable operators alike. A modification to the default rule for carriage elections would alleviate these substantial paperwork burdens by allowing both commercial stations and cable systems in their markets to interpret the absence of a timely, affirmative carriage notice as notice of an election of retransmission consent.

It is well understood that distributing affirmative election notices to cable operators can be a very time-intensive and expensive endeavor for broadcast stations. For example, in 2016, the Commission estimated that commercial broadcasters collectively spend 14,840 hours—or about 618 days—per year satisfying election notice requirements.¹² It can cost over \$6 per certified mailing to send election letters to cable headends, and it is not uncommon for a single broadcast station group to send *more than 1,000* letters to cover all of the systems in the market it serves—all by certified mail.¹³ Matters are made worse due to the severe

¹¹ 47 C.F.R. § 76.64(h).

¹² *Information Collection Being Submitted for Review and Approval to the Office of Management and Budget*, 81 Fed. Reg. 1627, 1628 (Jan. 13, 2016).

¹³ CBS, Disney, Fox, and Univision Comments at 11 & n.23.

consequences of making a defective election (*i.e.*, the defaulting to must carry, and thus uncompensated, carriage), which incentivizes broadcasters to mail duplicative notices in order to ensure that their electives are deemed effective.¹⁴

These burdens are not shouldered by commercial broadcasters alone. Cable operators must spend countless hours a year processing notices and ensuring that all notices from their broadcast partners have been received and accounted for, since these notices dictate the operators' obligations with respect to carriage of the stations' signals. While cable operators would continue to receive *some* election notices, including for those commercial stations electing must-carry status, the volume of notices would decrease substantially. Providing that a commercial station that does not affirmatively notify a cable operator of its election has elected retransmission consent status would therefore save broadcasters and cable operators—particularly those with small operations and limited budgets—significant time and money in connection with the triennial election process.

Making this change to the default election rule would be fully responsive to the questions posed in the NPRM, including, for example, the request for comment concerning rule changes that would “minimize the burden on broadcasters, ensure that [cable operators] receive the elections in a timely way, and still provide a mechanism by which broadcasters can demonstrate that they met the election deadline with respect to specific cable operators.”¹⁵ Today, by operation of the default rule, when a commercial broadcaster does not affirmatively send a timely election notice to the cable system, the cable system is on notice that the

¹⁴ See Comments of the National Association of Broadcasters at 23 n.47, *Modernization of Media Regulation Initiative*, MB Docket No. 17-105 (filed July 5, 2017) (“NAB Comments”).

¹⁵ NPRM at 14 (¶ 26).

broadcaster has elected must-carry status as of the deadline. Thus, the specific question of how to set the default rule—whether at retransmission consent or must-carry status—is one of the core issues involved in the broader question of how to reform rules for providing notice of carriage elections. At a minimum, given that the default election arises only when the station does not provide a timely notice in a specified manner, amending the default rule for cable carriage elections is a logical outgrowth of the Commission’s request for comment on how to reform rules for cable carriage notices.¹⁶

III. BY AMENDING THE DEFAULT RULE FOR CABLE CARRIAGE ELECTIONS FROM MUST CARRY TO RETRANSMISSION CONSENT, THE COMMISSION WOULD ELIMINATE REGULATORY INCONSISTENCY WITH RESPECT TO SATELLITE CARRIERS.

Currently, the Commission’s rules treat cable systems and satellite carriers differently for purposes of default elections, with a default status of must carry for the former and retransmission consent for the latter. Changing the default rule for cable carriage elections thus would resolve a disparity in the Commission’s treatment of these two categories of MVPDs.

Specifically, Section 76.64 of the Commission’s rules, regarding carriage elections on cable systems, provides in part that commercial stations that “fail to make an election by the specified deadline will be deemed to have elected must carry status for the relevant three-year period.”¹⁷ In contrast, when a station does not provide notice of a carriage election to a satellite carrier providing local-into-local service in its market, the consequence is

¹⁶ See, e.g., *Covad Commc’ns Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006) (“An agency’s final rule need only be a ‘logical outgrowth’ of its notice.”) (internal citations and quotations omitted).

¹⁷ 47 C.F.R. § 76.64(f)(3).

that the station is not entitled to mandatory carriage.¹⁸ Given that most commercial stations today desire to elect retransmission consent status, as noted above, there is no rational basis for this regulatory asymmetry between cable operators and satellite carriers.

IV. THE COMMISSION SHOULD AMEND ITS RULES TO PROVIDE FOR ELECTRONIC NOTICE OF AFFIRMATIVE CARRIAGE ELECTIONS.

As noted above, a modification to the default election rule for cable carriage would significantly decrease the volume of notices that commercial broadcasters would have to send to cable operators and that cable operators therefore would have to process. More can be done, however, to modernize rules for carriage elections. In particular, for those situations in which a commercial station provides affirmative notice of a carriage election, the Commission should modernize its rules so that notice can be provided electronically.

In response to the Commission's Public Notice soliciting proposals for its modernization of media regulation initiative, many parties encouraged the Commission to provide for electronic notice of carriage elections.¹⁹ The Joint Broadcast Commenters are supportive of such measures, as they would help to alleviate logistical challenges for both commercial stations and cable operators.

For example, the Commission could allow carriage election notices to be uploaded to stations' online public files, rather than sent by certified mail to each cable system.

¹⁸ *Id.* § 76.66(d)(1)(v).

¹⁹ *See, e.g.*, NAB Comments at 22-23; Comments of Nexstar Broadcasting, Inc. at 16-17, *Modernization of Media Regulation Initiative*, MB Docket No. 17-105 (filed July 5, 2017); Reply Comments of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, and FBC Television Affiliates Association at 10-11, *Modernization of Media Regulation Initiative*, MB Docket No. 17-105 (filed Aug. 4, 2017); Joint Reply Comments of the Named State Broadcasters Associations at 7-8, *Modernization of Media Regulation Initiative*, MB Docket No. 17-105 (filed Aug. 4, 2017).

This process would benefit broadcasters and cable operators alike. Broadcasters no longer would be required to attempt to identify and locate the mailing address of each and every cable system in their market, and cable operators no longer would have to receive and process certified letters from every station at each individual system that the operator owns in the market.

Allowing stations to make carriage notices available via their online public file—or using similarly efficient means of providing electronic notice of carriage elections—would be in line with the Commission’s recent shift toward Internet-based solutions in other contexts. Given the inefficiencies of sending certified letters to individual cable systems, the carriage notice rules are a logical next step in the Commission’s embrace of the shift from paper to electronic notice mechanisms.²⁰

²⁰ See, e.g., 47 C.F.R. § 79.1(m) (effective pending Commission announcement) (amending closed captioning certification rules to require video programmers to submit closed captioning certifications directly to the Commission using a web-based form filing system); *id.* § 76.1700(a) (requiring public inspection file records maintained by cable system operators to be placed in the operators’ online public file); *id.* § 73.682(e)(3)(i)(A) (providing that broadcasters may demonstrate compliance with rules promulgated under the CALM Act by relying on a network’s or other programmer’s certification of compliance with such rules, so long as, among other things, “[t]he certification is widely available by Web site or other means to any television broadcast station, cable operator, or multichannel video programming distributor that transmits that programming”); *National Cable & Telecommunications Association and American Cable Association Petition for Declaratory Ruling*, Declaratory Ruling, 32 FCC Rcd 5269 (2017) (permitting cable operators to distribute annual customer service notices required by Section 76.1602(b) of the Commission’s rules via email, subject to customer opt-out requirements); *Revisions to Public Inspection File Requirements—Broadcaster Correspondence File and Cable Principal Headend Location*, Report and Order, 32 FCC Rcd 1565 (2017) (eliminating rules requiring cable operators to maintain for public inspection the designation and location of the cable system’s principal headend).

CONCLUSION

The current default election of must carry imposes significant financial and administrative costs with few to no attendant benefits, either for commercial broadcasters or cable operators. As part of its reform of the process for notifying MVPDs of carriage elections, the Commission should update the default election for cable systems—such that a commercial broadcast station that does not affirmatively send a notice will be deemed to have notified the cable system that it has elected retransmission consent. In addition, the Commission should modernize its rules to provide for electronic notice of affirmative carriage elections, which will further reduce unnecessary paperwork burdens on all parties.

Respectfully submitted,

**CBS CORPORATION
THE WALT DISNEY COMPANY
21ST CENTURY FOX, INC.
UNIVISION COMMUNICATIONS INC.**

By: _____/s/

Matthew S. DelNero

Brandon H. Johnson

COVINGTON & BURLING LLP

One CityCenter

850 Tenth Street NW

Washington, DC 20001

(202) 662-6000

mdelnero@cov.com

bjohnson@cov.com

Their Attorneys

/s/

Mark J. Prak
David Kushner
Charles F. Marshall
Julia Ambrose
BROOKS, PIERCE, MCLENDON, HUMPHREY &
LEONARD, LLP
1700 Wells Fargo Capitol Center
150 Fayetteville Street
Raleigh, NC 27601
P.O. Box 1800 (27602)
t: (919) 839-0108
f: (336) 232-9208

*Counsel to ABC Television Affiliates
Association and NBC Television Affiliates*

February 15, 2018

/s/

John Feore
COOLEY LLP
1299 Pennsylvania Avenue, NW
Suite 700
Washington, DC 20004
(202) 842-7800

*Counsel to CBS Television Network Affiliates
Association and FBC Television Affiliates
Association*